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In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 1225

THE BALTIMORE AND OHIO RAILROAD COMPANY, ET AL., APPELLANTS

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

MOTION TO AFFIRM

Pursuant to Rule 16(1)(c) of the Rules of this Court, the United States of America and the Interstate Commerce Commission move that the judgment of the district court be affirmed.

STATEMENT

This is a direct appeal from a final judgment of a three-judge district court (J.S. App. A) dismissing a suit brought to set aside an order of the Interstate

Commerce Commission approving the Erie-Lackawanna Railroad Company's multiple-car rates on iron ore from Cleveland, Ohio to fifteen destinations in Pennsylvania and Ohio (J.S. App. B; *Iron Ore, Cleveland, Ohio to Ohio and Pennsylvania*, 323 I.C.C. 746). The facts are undisputed (J.S. 3a). Appellants (protestants before the Commission) are nine railroads (J.S. 1a) which compete with the Erie-Lackawanna for the carriage of iron ore by rail from docks on Lake Erie to steel mills located at points in Ohio and Pennsylvania (J.S. 2a-3a, 32a-33a). The ore is mined from the Mesabi Range and is carried by ore vessels across the Great Lakes (J.S. 3a). Between 1947 and 1963 the total tonnage of iron ore handled by all railroad docks at Lake Erie ports declined (J.S. 22a-23a, 32a). Erie-Lackawanna's decline was substantial (J.S. 22a, 23a) and indeed greater than appellants' (J.S. 4a, 23a); its revenue loss was also disproportionate (J.S. 10a, 23a).

The inadequacy of Erie-Lackawanna's dock facility at Cleveland, Ohio has been responsible for its deteriorating position (J.S. 20a-21a). Since 1950 there has been a trend toward the use of larger vessels in the Great Lakes iron ore trade (J.S. 21a). These vessels are unable to use the Erie-Lackawanna dock because of navigational problems (J.S. 20a, 21a); the result is that Erie-Lackawanna is effectively barred from competing with appellants for the transportation of ore carried in such ships (J.S. 5a, 21a).[1] Erie-Lackawanna is also at a disadvantage in

[1] Even after the scheduled correction of the navigational impediments, which cannot be completed for five or six years, Erie-Lackawanna will not be able to accommodate the larger

competing with appellants for ore traffic handled by smaller vessels (J.S. 22a), because more tugboat assistance is required for these smaller ships to reach the Erie-Lackawanna dock than the other Lake Erie railroad docks, and there are costly delays as a result (J.S. 22a).

To be able to compete more effectively for a share of the iron ore traffic transported in smaller vessels, and thereby to improve its financial condition, Erie-Lackawanna proposed a new multiple-car rate on shipments of iron ore from its dock to fifteen points in Ohio and Pennsylvania (J.S. 10a, 18a-20a). Single-car rates remain unchanged (J.S. 20a). The new multiple-car rate is 20 cents lower than the single-car rate (J.S. 19a). It was stipulated that the new rates are compensatory, whether measured by fully distributed or out-of-pocket costs (J.S. 19a).

The Commission held that the multiple-car rates for single-destination shipments[2] were reasonable, and not a destructive competitive practice under the criteria of the National Transportation Policy (49 U.S.C. preceding Section 1) and 49 U.S.C. 15(a)(2) (J.S. App. B). The three-judge district court unanimously held that the Commission had made adequate

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ships at its dock until the dock is reconstructed at an estimated cost of $1,653,000 (J.S. 21a-22a). Such funds are not at present available to the carrier (J.S. 22a).

[2] The Commission held that rates for shipments moving to two or more destinations had not been shown by the parties' stipulation to be compensatory, and to this extent it disapproved the tariff. The tariff was then amended to eliminate the rejected portion (J.S. 29a-30a, 2a).

findings in support of its conclusions, that the order was based on substantial evidence, and that the Commission's legal conclusions were not erroneous (J.S. App. A).

ARGUMENT

The thrust of appellants' contentions in this Court is that the Commission, in concluding that Erie-Lackawanna's new rates were reasonable, went no further than to determine that they were compensatory, ignoring completely the impact of the rates upon the existing rate structure. The Commission in fact gave close consideration to the probable effects of the new rates. Thus, its report is replete with findings concerning the existing rate structure, the comparative impact on Erie-Lackawanna and appellants of recent changes in the traffic, and Erie-Lackawanna's competitive handicaps (J.S. App. 18a-26a). It was on the basis of such findings—not merely the stipulation that the new rates were compensatory—that the Commission decided, "in the circumstances here presented, we cannot conclude that those rates constitute a destructive competitive practice" (J.S. App. 28a).

The Commission properly declined to attach controlling importance to the possible impact of the new rates on appellants' rates. As it pointed out (J.S. 28a), "'a policy of ratemaking based primarily on maintenance of the *status quo* would be the antithesis of competition'," and would ignore the teachings of this Court that there is a zone between the reasonable maximum and reasonable minimum rates within which a carrier may adjust its charges to meet com-

petitive conditions. *United States* v. *Chicago M. St. P. & P. R. Co.*, 294 U.S. 499, 506; *Texas & Pacific Ry. Co.* v. *United States*, 289 U.S. 627, 636; *United States* v. *Illinois Cent. R. R.*, 263 U.S. 515, 522. Given Erie-Lackawanna's exigent circumstances, it is plain that the new rates were a reasonable defensive, not destructive, competitive response. The mere possibility that appellants might eventually be required to reconsider their own rates was not enough to establish destructive competition,[3] especially since the Commission, as it noted (J.S. 27a), has ample power to deal with any dislocations that might result from the rate reductions.

Finally, the Commission did not apply to the issues of intra-modal competition involved here the standards of Section 15(a)(3) of the Act (49 U.S.C. 15(a)(3)), which provides that, in determining minimum reasonable rates in cases involving intermodal competition, "[r]ates of a carrier shall not be held up to a particular level to protect the traffic of any other mode of transportation." As the court below observed (J.S. App. 15a), this section was neither cited nor relied upon by the Commission, albeit the Commission did cite some cases decided under that section for the light they might throw on the meaning of "destructive competitive practices"—an undefined term in the National Transportation Policy. See, *e.g.*, *Interstate Commerce Commission* v. *New York, N. H. & H. R. Co.*, 372 U.S. 744, 759.

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[3] As noted by the district court (J.S. App. 15a), the new rates have had no impact on the existing rate structure in their first year.

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted.

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